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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LARRY PENA, Defendant and Appellant.	E064692 (Super.Ct.Nos. RIF1400988, RIF1401736, SWF1500028) OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal, Collette C. Cavalier, Elizabeth M. Kuchar, and Genevieve R. Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Larry Pena pled guilty to several charges in four separate cases, including two counts of unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) and three counts of grand theft (Pen. Code, § 487, subd. (a)). The initial plea agreements in two of the cases (Superior Court of Riverside County, Nos. RIF1401736 and SWF1500028)[1] were modified by the parties at sentencing. On appeal, defendant claims the sentence imposed in RIF1401736 violated his rights to due process because it differed from the previously-agreed-upon sentence in the initial plea agreement. Additionally, he contends this matter should be remanded for resentencing on his Vehicle Code section 10851 convictions. (Pen. Code, § 1170.18, Safe Neighborhoods and Schools Act (Proposition 47).) We reject his contentions and affirm.

I. PROCEDURAL BACKGROUND AND FACTS

A. Defendant's Cases.

RIF1400988 — As a result of his actions on January 12, 2014, on November 20, 2014, defendant pled guilty to unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) and received an agreed upon sentence of 16 months in county jail to be served concurrently with his sentence in RIF1401736.

RIF1401736 — As a result of his actions on November 23, 2013, on November 20, 2014, defendant pled guilty to unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) and admitted that he suffered two prior felony convictions within the meaning of Penal Code section 667.5, subdivision (b). He agreed

[1] Hereafter only the case numbers will be noted, all being in the Superior Court of Riverside County.

to a split sentence pursuant to Penal Code section 1170, subdivision (h), of one year in county jail and one year of post-release mandatory supervision to be served concurrently with all other cases.

RIF1404849 — Prior to being sentenced in RIF1400988 and RIF1401736, on September 11, 2014, defendant was charged with possession a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and paraphernalia used for consuming a controlled substance (Health & Saf. Code, former § 11364.1), and it was alleged that he suffered three prior second degree burglary convictions within the meaning of Penal Code section 667.5, subdivision (b), and one prior robbery conviction in violation of Penal Code sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). He agreed to a sentence of 180 days in county jail to run concurrent with his sentence in RIF1400988.

SWF1500028 — Prior to being sentenced in the above cases, on November 5, 2014, defendant was charged with eight counts of grand theft (Pen. Code, § 487, subd. (a)), and it was alleged that he suffered a prior felony conviction within the meaning of Penal Code section 667.5, subdivision (b). On September 21, 2015, the same day set for sentencing in all of defendant's cases, he entered a plea agreement in SWF1500028. Defendant pled guilty to three counts of grand theft (Pen. Code, § 487, subd. (a)), and admitted that he suffered a prior felony conviction within the meaning of Penal Code section 667.5, subdivision (b). According to the plea agreement, defendant agreed to a split sentence pursuant to Penal Code section 1170, subdivision (h), of one year in county

jail and two years of post-release mandatory supervision to be served consecutively to his sentences in RIF1400988 and RIF1401736.

B. Sentencing.

On September 21, 2015, defendant was sentenced in accordance with his plea agreements in RIF1400988 (16 months in county jail concurrent to the other cases), RIF1404849 (180 days in county jail concurrent to RIF1400988) and SWF1500028 (one year in county jail and two years of post-release mandatory supervision consecutive to RIF1400988 and RIF1401736). In RIF1401736, the prosecutor informed the trial court that they were changing the sentence to two years in custody instead of one year. Neither defendant nor his counsel objected to the change. However, the written plea agreement was never modified to reflect the change.

II. DISCUSSION

A. The Sentence Imposed in RIF1401736 Did Not Violate Defendant's Due Process Rights Because He Consented to a Modification of the Plea Agreement at the Sentencing Hearing.

Defendant contends that his due process rights were violated and the terms of his plea agreement in RIF1401736 were breached when the trial court sentenced him to two years in custody instead of a split sentence of one year in custody and one year of mandatory supervision. We disagree.

1. Further Background Facts.

On September 21, 2015, defendant was sentenced in all four cases. When the trial court began to sentence defendant in RIF1401736, the following exchange occurred:

"[THE COURT:] And the next one, RIF1401736. And so this one, you pled. It's a [Vehicle Code section] 10851, and you admitted two prison priors. On this one we are going to give you the midterm of two years. And a —

"[PROSECUTOR]: Your Honor, we're making a change. Where it originally said one in and one out, we are going to do two years all in.

"THE COURT: So I am going to strike the prison priors, because it says 'stay' them, but he already admitted it on the other one; right?

"[PROSECUTOR]: Yes.

"THE COURT: Okay. So on the [Vehicle Code section] 10851, you already pled to the prison priors, on motion of the People, I'm going to give you the midterm of . . . two years. This is all in and concurrent with the other case." There was no objection from defendant.

Turning to SWF1500028, the trial court asked if defendant would be receiving the "upper term of three years" on one count, with concurrent sentences on the other counts. The prosecutor replied that defendant would be receiving "one third the midterm running consecutive." When the court noted that the sentence would be 48 months (eight months [one third of two years] times six counts) the prosecutor informed the court that they agreed to two years. The court then suggested that it give defendant the upper term of three years (one year in and two years out) and run the other five counts concurrent, and strike the prior. The prosecutor replied, "I'm sorry, your Honor. There is a problem with—legally with doing that because the one year in would then become concurrent not

consecutive." The prosecutor noted that the parties needed more time because there would be a modification. The following exchange occurred:

"THE COURT: Okay. What are you worried about? I'm not quite clear.

"[DEFENSE COUNSEL]: We're trying to get three in, two out total. We are trying to run the one year consecutive to the two he's doing in on the RIF cases. In the one that he already pled to ending 736, we just want to do one year consec[utive] to those two years.

"THE COURT: Okay. Since there is plenty of material here to work with, the easiest way is to do it all on the case we're doing right now, and then make everything else concurrent. What's your total goal, in terms of custody?

"[DEFENSE COUNSEL]: Three in, two out.

"THE COURT: So you're looking for five years total. Three in, two out. I'm pretty sure we can do that pretty easily here with the one 1500028, making everything concurrent, whether it's in custody time or mandatory supervision time. But if you guys need a little bit more time to talk about it, no problem."

After a brief recess, defendant was sentenced in SWF1500028 to a total term of three years, one year in and two years out, consecutive to RIF1400988 and RIF1401736. When the trial court inquired into how much total time defendant would be serving in custody, defense counsel replied, "Three years." In reaching a total sentence (on all four cases), it appears that both sides agreed that the sentence would be a split sentence pursuant to Penal Code section 1170, subdivision (h), of three years in county jail, and two years of post-release mandatory supervision. It further appears that this was

accomplished by modifying the sentence in RIF1401736 to two years in custody. Otherwise, it is questionable whether defendant would have received such a favorable sentence in SWF1500028 given his potential exposure, i.e., he pled guilty to six counts of grand theft (Pen. Code, § 487, subd. (a)) and admitted a prison prior.

2. Applicable Law.

It is well known that negotiated plea agreements are an "'accepted and integral part of our criminal justice system.'" (*People v. Panizzon* (1996) 13 Cal.4th 68, 79-80.) Both parties must abide by their terms (*People v. Segura* (2008) 44 Cal.4th 921, 930-931), and both parties must consent to modification of any material terms. (*People v. Martin* (2010) 51 Cal.4th 75, 80-81.) Due process applies both to the procedure of accepting the plea and to implementation of the bargain itself. "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433].) This does not mean that any violation of the agreement is constitutionally impermissible. To violate due process, "the variance must be 'significant' in the context of the plea bargain as a whole to violate the defendant's rights." (*People v. Walker* (1991) 54 Cal.3d 1013, 1024, overruled on other grounds by *People v. Villalobos* (2012) 54 Cal.4th 177, 183.)

In analyzing whether there was a breach of a plea agreement, we must first determine the specific terms of the agreement. (*People v. Knox* (2004) 123 Cal.App.4th 1453, 1459.) In interpreting a plea agreement, we apply the de novo standard of review. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*. (2003) 107 Cal.App.4th 516, 520;

People v. Toscano (2004) 124 Cal.App.4th 340, 344 [plea agreements are interpreted in accordance with the rules of contract].)

3. Analysis.

According to defendant, his plea agreement in RIF1401736 was breached when the trial court sentenced him to two years in custody instead of the split sentence (one year in custody and one year of mandatory supervision) stated in the plea agreement. There is evidence, however, that the written plea agreement does not reflect the final agreement of the parties. In the plea agreement itself, defendant initialed the sentence, "All the promises made to me are written on this form, or stated in open court." The transcript of the sentencing hearing makes it apparent that both parties intended to modify the original term of a split sentence in RIF1401736: the prosecutor's statement that "we're making a change," the absence of an objection by defendant or defense counsel, and the parties' subsequent reference to the new sentence.

Also, during the same sentencing hearing, the parties modified two other plea agreements, one in RIM1409247 and SWF1500028, however, defendant does not challenge those modifications. Moreover, the record shows that the modification of the split sentence in RIF1401736 was the result of the agreement reached in SWF1500028 (defendant pled guilty to six grand theft counts, and admitted a prison prior), the case that defendant received an extremely lenient sentence when compared to his exposure. The parties had a specific total term in mind (five years; three in custody and two years of mandatory supervision) at the time defendant entered his plea in SWF1500028 and was sentenced in all of his cases. Because defendant was sentenced in accordance with that

specific term, we conclude that there was no breach of any material term of his plea agreement in RIF1401736, and his due process rights were not violated.

B. Defendant Is Not Entitled to a Remand for a Proposition 47 Hearing.

Defendant argues that this court must remand this matter back to the trial court to determine his eligibility for resentencing in RIF1400988 and RIF1401736, involving his convictions for Vehicle Code section 10851, subdivision (a). We disagree. As explained in *People v. Bradshaw* (2016) 246 Cal.App.4th 1251, 1257, persons seeking to avail themselves of the benefits of Proposition 47 must first file a petition in the superior court. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1331-1332 ["the remedy lies in the first instance by filing a petition to recall (if currently serving the sentence) or an application to redesignate [or reclassify] (if the sentence is completed) in the superior court of conviction"]; see *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 925, 929-930 [defendant seeking resentencing under Proposition 47 must file petition for recall of sentence in trial court once underlying judgment is final]; see also *People v. Shabazz* (2015) 237 Cal.App.4th 303, 313-314 [defendant limited to statutory remedy set forth in Pen. Code, § 1170.18, which requires a defendant who has completed felony sentence to file an application in the superior court for reclassification].) It does not appear defendant has filed a petition for his convictions for the unlawful taking or driving of a vehicle.

III. DISPOSITION

The judgment is affirmed without prejudice to defendant seeking relief in the trial court pursuant to Penal Code section 1170.18.

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RAMIREZ
P. J.

We concur:

MCKINSTER
J.

SLOUGH
J.